No. 13,088

IN THE

United States Court of Appeals

For the Ninth Circuit

DONALD McKITTRICK and BARBARA McKITTRICK,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' REPLY BRIEF.

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Subject Index

Table of Authorities Cited

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APPELLANTS' REPLY BRIEF.

In our opening brief we clearly pointed out two errors, and two errors only, which the District Court committed. These were:

1. The District Court improperly placed on appellants the burden of proving restitution should not be granted and decided against them, not because the United States established that restitution *should* be ordered, but because appellants failed to establish that restitution *should not* be granted, and,

2. In awarding a judgment for treble damages for the last three months of overcharges and ordering restitution of the same amount the District Court in effect required appellants to pay four times the over-

charge, whereas Congress has provided the maximum civil penalty to be three times the overcharge.

THE AUTHORITIES CITED BY APPELLEE DO NOT SUSTAIN THEIR POSITION THAT THE BURDEN WAS UPON APPELLANTS TO ESTABLISH RESTITUTION SHOULD NOT BE ORDERED.

As we read appellee's brief, these two points are answered only with confusion. A reference to the decisions from this Circuit cited by appellee in its brief can quickly clarify this confusion.

Fontes v. Porter (1946) (C.C.A. 9th), 156 F. (2d) 956 is cited (Appellee's Brief p. 16) for the proposition that the burden was upon appellants to establish that restitution should not be ordered. That was an appeal from a judgment awarding damages. Restitution was not involved. This Court there said:

> "Good faith, however, is not a defense *to an action for damages*. Lack of willfulness, coupled with the taking of practicable precautions against occurrence of a violation, *operates only to reduce damages* to the amount of the overcharge." (Italics ours for emphasis.)
>
> *Fontes v. Porter* (1946) (C.C.A. 9th), 156 F. (2d) 956, 958.

Again in *Mattox v. United States* (1951) (C.A. 9th), 187 F. (2d) 406 reversed a judgment denying damages where there were overcharges, and holds that a judgment *for damages* is mandatory. More is said of this decision later.

Porter v. Crawford & Doherty Foundry Co. (1946) (C.C.A. 9th), 154 F. (2d) 431, is cited (Appellee's Brief pp. 13, 15) for the proposition that equitable relief is mandatory. The judgment of dismissal in so far as it denied an injunction (restitution was not involved) was reversed because the District Court had erroneously decided that certain consent of the administrator was necessary (see 154 F. (2d) 431, 435). And in discussing the *damages* phase (not restitution) this Court pointed out that collusion of the purchaser, or the fact he was not injured or damaged, does not bar the right of the United States to damages.

United States v. Gruble (1951) (C.A. 9th), 186 F. (2d) 470 is cited (Appellee's Brief pp. 13, 14) that even a voluntary side agreement or release from the tenant is no defense to an action for restitution. In that case, restitution was not considered. This Court there said:

> "Where *a statutory proscription* is placed upon one party he may not plead the collusion of a third party *in justification for violation of the statutory edict.*
>
> "We agree with appellant that under the undisputed facts shown by the brief record before us *it was incumbent upon the court to grant judgment for an amount no less than the single amount of overcharge.*" (Italics ours for emphasis.)
>
> *United States v. Gruble* (1951) (C.A. 9th), 186 F. (2d) 470, 472, 473.

Appellee cites *Bray v. Peck* (1951) (C.A. 9th), 190 F. (2d) 998 for the proposition that the voluntary

payment of the rent by the tenant was no defense to an action seeking restitution (Appellee's Brief p. 13). That action was not brought by the United States, and did not involve restitution. It was an action at law brought by the tenant for three times the overcharges and attorney fees. That case does not hold that the burden of proof in an equitable action for restitution is on the defendant. The Court held in an action for damages:

> "* * * the burden of proof is upon that party which seeks to prove the premises are decontrolled."
>
> *Bray v. Peck* (1951) (C.A. 9th), 190 F. (2d) 998, 1002.

Appellee cites *Woods v. McCord* (1949) (C.A. 9th), 175 F. (2d) 919 for the propositions that restitution is primarily concerned with the public rights (Appellee's Brief p. 11) and that the one year limitation statute is not applicable to a suit for restitution (Appellee's Brief p. 15). In speaking of injunctive relief (not restitution) this Court said:

> "The standard of public interest is the primary measure of the propriety and need for *injunctive relief* in these cases. Hecht Co. v. Bowles, 1944, 321 U.S. 321, 329, 64 S. Ct. 587, 88 L. Ed. 754". (Italics ours for emphasis.)
>
> *Woods v. McCord* (1949) (C.A. 9th), 175 F. (2d) 919, 922.

This Court there reversed a judgment which denied said:

> "* * * it is not necessary that a landlord be at fault in order for it to be equitable to require him to restore that which he has illegally received".
>
> *Woods v. McCord* (1949) (C.A. 9th), 175 F. (2d) 919, 922.

This court there reversed a judgment which denied restitution. Two things are significant. In the first place, the judgment denying restitution was not reversed as to those violations which were "settled out of court", and second, the reversal was ordered because:

> "In view of the facts as set out by the entire record, *we hold that it was an abuse of sound discretion* to refuse to order restitution."
>
> *Woods v. McCord* (1949) (C.A. 9th), 175 F. (2d) 919, 922.

In the instant case this Court does not know and cannot tell what the facts were. There was a sharp conflict as to many of the facts. The District Court did not resolve those conflicts. He merely determined that appellants had failed to show why restitution should be granted, without determining what facts appellants had demonstrated, and what claimed facts they had not demonstrated.

Appellee cites *Woods v. Davis* (1950) (C.A. 9th), 185 F. (2d) 567 as holding that restitution in this case was mandatory. This Court did not so hold in that case. There two defenses to restitution seem to have appealed to the District Court. One was the financial

inability of the defendant to make restitution. The other was her good faith in charging what her predecessor had charged. The order of restitution was denied for these two reasons. Respecting these two reasons, this Court said:

> "A claim of inability to refund excess rentals, unlawfully exacted of tenants, may not be considered in the trial or determination of a suit by the Expediter to obtain a restitution order * * *
>
> "The mere fact that the defendant took over the units from another person and continued to charge the same rentals as had been charged by her predecessor affords no equitable reason for declining to order restitution of the illegal gains."
>
> *Woods v. Davis* (1950) (C.A. 9th), 185 F. (2d) 567, 569.

This Court did not order restitution. It merely remanded the cause

> "for further proceedings not inconsistent with this opinion."
>
> *Woods v. Davis* (1950) (C.A. 9th), 185 F. (2d) 567, 569.

Had this Court intended to rule as appellee contends, that the language used by this Court:

> "The law is no respecter of persons, and we think the best way to educate those contemplating evasion of it is to demonstrate that violation will in every case result in judgment against the wrongdoer."
>
> *Wood v. Davis* (1950) (C.A. 9th), 185 F. (2d) 567, 569,

meant that restitution was mandatory in every case, there would have been no reason for remanding that case for further proceedings. Nor can this language be reasonably interpreted as shifting the burden of proof in restitution cases.

Appellee cites *Woods v. Richman* (1949) (C.A. 9th), 174 F. (2d) 614, for the same propositions. This Court did not there so hold. There the District Court had held it was without jurisdiction to try the cause asking damages and restitution because the one year statute had run and the act which made illegal the payment of the money sought to be restored had by its own terms expired. This Court there said:

> "We think, therefore, that it continues to be appropriate for the courts to consider whether an order of restitution should be made as a means of giving effect to the declared policy of Congress. The judgment appealed from is accordingly reversed and the cause remanded *with directions to the court to hear the evidence and,* in the light thereof, *to exercise the discretion which belongs to the court.*" (Italics ours for emphasis.)
>
> *Woods v. Richman* (1949) (C.A. 9th), 174 F. (2d) 614, 616.

By this decision this Court seems to have held that whether restitution should be ordered is a matter of discretion, not a matter of right. Nor did this Court by that decision, shift the burden of proof.

Appellee cites this Court's decision in *Bowles v. Huff* (1944) (C.C.A. 9th), 146 F. (2d) 428 as holding that the District Court properly exercised its discre-

tion in the instant case. In that decision this Court did not so hold. All that this Court held in that case was that it was a proper exercise of the equity jurisdiction of the District Court to deny an injunction where there was proof that violations had ceased. This Court followed the decision of the United States Supreme Court in *Hecht Co. v. Bowles* (1944), 321 U.S. 321, 64 S. Ct. 587, 88 L. Ed. 756 that the granting of equitable relief in rent overcharge cases is subject to the same rules as the granting of equitable relief in any other set of circumstances, which is precisely the point which appellants contend the District Court disregarded. This decision supports the position of the appellants.

APPELLEE'S AUTHORITIES DO NOT SUPPORT THEIR POSITION THAT RESTITUTION AND TREBLE DAMAGES MAY BOTH BE ORDERED.

In *Mattox v. United States* (1951) (C.A. 9th), 187 F. (2d) 406, this Court spoke of the mandatory phase of the award of damages in the amount of the overcharge. This Court there said:

> "This mandatory principle is in no wise affected by a grant of restitution to the tenant. Restitution is an equitable remedy resorted to under § 206(b) independently of the award of damages * * * (citations omitted) * * * Accordingly we are of the opinion that the trial court erred in denying damages *at least in the amount of the overcharges.*"
>
> *Mattox v. United States* (1951) (C. A. 9th), 187 F. ((2d) 406, 408.

This Court did not hold that the right to restitution and to treble damages coexisted. In fact this Court pointed out in a footnote to its opinion:

> "Where restitution is decreed and statutory damages awarded, the treble damage award appears sometimes to have been reduced by the amount of the restitution required, and this seems to have been done at the instance of the rent control authorities. See United States v. Gianoulis, 3 Cir. 183 F. (2d) 378; Miller v. United States, 5 Cir. 186 F. 2d 937. While this practice may be thought to have statutory justification, we can see no possible basis in the law for deducting the restitution award where the damages found allowable are the amount of the overcharges, only."
>
> *Mattox v. United States* (1951) (C.A. 9th), 187 F. (2d) 406, 408 Note 2.

This Court will note that the appellee refers to two decisions from other Circuits, *Woods v. Witzke* (1949) (C.A. 6th), 174 F. (2d) 855 and *United States v. Ziomek* (1951) (C.A. 8th), 191 F. (2d) 818 as holding that the Court may properly grant not only treble damages, but also order restitution of the overcharge trebled to the end that the overcharger repays four times the amount of the overcharge. In neither of these two cases was an argument presented on behalf of the appellee. Each seems to be a one sided presentation by the United States. It is submitted that except in an extreme case, which this is not, the award of restitution for that part of the damages which are trebled is an abuse of discretion and should be corrected on appeal.

CONCLUSION.

There are conflicts in the evidence. The District Court could have resolved these conflicts against appellants, and upon the evidence could have found that the evidence justified an order for restitution. Such a judgment would have been sustained by the evidence and it would have been the duty of this Court to affirm such a judgment. But the District Court did not do this.

Instead, the District Court left the record in such a condition that we do not know whether Wilson induced the overcharges or whether McKittrick induced them. We do not know whether the written lease which bound Wilson to pay only the ceiling rent was a mere subterfuge or whether Wilson paid the excess voluntarily. We do not know whether the appellants lost money by letting Wilson occupy the house or not, or whether Wilson induced the appellants not to occupy the house. We do not know what the equities are. It was the duty of the District Court to make all these determinations. It is beyond the province of this Court to make such a determination on the record alone.

It is submitted that if Wilson trapped appellants into this situation, and induced them not to occupy their own house for the sole purpose of later asking for restitution, and if he was the oppressor, not the oppressed, it would have been an abuse of discretion to allow him to have restitution.

Where, instead of resolving these conflicts the District Court decided it was mandatory upon him to

order restitution unless appellants shouldered the burden of proving that restitution should not be granted, the District Court failed to follow the established rules of equity which place the burden of proof upon the plaintiff, and this error should be corrected.

This error was brought to the attention of the District Court and he was shown that he could amend his findings and properly arrive at the same judgment. This the District Court chose not to do. Instead he chose to present to this Court the determination of a question which has as yet been undecided. Although the decisions cited in our opening brief indicate the District Court was in error, the District Court chose to base his decision not on his conclusions from the evidence offered, but on the basis that it was *mandatory* on him to order restitution unless the appellants established a burden of showing that restitution should not be granted.

The judgment should be reversed.

Dated, Berkeley, California,
March 26, 1952.

Respectfully submitted,
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Attorney for Appellants.